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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RITA NINA FLOYD,

Defendant and Appellant.

F056741

(Super. Ct. No. CRF9998)

**OPINION**

**THE COURT**\*

APPEAL from a judgment of the Superior Court of Tuolumne County. Eric L. DuTemple, Judge.

Susan K. Keiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J.; Cornell, J.; and Gomes, J.

Appellant, Rita Nina Floyd, entered guilty pleas to two counts of identity theft in 2002 (case number CRF9710 [case 9710]) and one count of identity theft in 2003 (case number CRF9998 [case 9998]). (Pen. Code, § 503.5, subd. (a).)<sup>1</sup> In both cases the court suspended sentence and placed appellant on probation for a period of five years.

In October 2006, appellant was sentenced to a nine-year term of imprisonment in New Mexico.

In March 2007, appellant mailed a handwritten “motion” she prepared in propria persona to the superior court. This document referenced case 9998 and purported to demand concurrent sentencing on the probation violation. A second, nearly identical “motion” was received by the court in April 2007. The court denied both “motions.”

In May 2007, the probation department filed an affidavit in support of revoking appellant’s probation because of appellant’s New Mexico sentence. An order to show cause was heard on July 2, 2007. At that time, defense counsel argued that the court lacked jurisdiction over appellant under section 1203.2a and the matter was set for hearing to determine whether appellant had satisfied any of the notice requirements contained in that section.

In July 2007, appellant mailed two handwritten letters to the court asking for concurrent sentencing.

In August 2007, defense counsel filed a motion to terminate probation and the court’s jurisdiction to impose sentence pursuant to section 1203.2a. The court denied the motion concluding that it did not lose jurisdiction to sentence appellant because she did not provide the probation department or the court with notice satisfying the requirements of section 1203.2a.

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<sup>1</sup> All further statutory references are to the Penal Code.

On September 7, 2007, appellant, through defense counsel, filed a demand for sentencing in cases 9998 and 9710 pursuant to section 1203.2a. The trial court imposed the aggravated term of three years in case 9998 and two consecutive terms of eight months each in case 9710. This sentence was to run consecutive to the sentence imposed by New Mexico.

Appellant separately appealed the judgments in cases 9998 (appeal number F054010) and 9710 (appeal number F054011). Appellant argued that the court lacked jurisdiction to sentence her pursuant to section 1203.2a. Appellant further argued that the imposition of the aggravated term in case 9998 prejudicially infringed her jury trial right.

In both F054010 and F054011, this court held that the trial court had jurisdiction to sentence appellant because appellant did not provide the court or the probation department with notice satisfying the section 1203.2a requirements. Therefore, the time limits contained in that section did not commence to run. However, this court also concluded that the trial court erred in imposing the aggravated term in case 9998. Accordingly, the judgment in case 9710 was affirmed. The conviction in case 9998 was also affirmed but the sentence was vacated and the case was remanded to the superior court solely for resentencing in accordance with the opinion.

On November 17, 2008, the trial court resentenced appellant on both cases. In case 9998, the court sentenced appellant to the midterm of two years. In case 9710, the court sentenced appellant to two consecutive eight-month terms. Appellant's total sentence of three years four months was ordered to run consecutive to the New Mexico prison sentence. Appellant separately appealed both cases.

Appellant argues these sentences must be vacated because she was sentenced in absentia without having waived her right to be personally present at sentencing. As discussed below, appellant waived her right to be present in September 2007 when she filed a request to be sentenced through her counsel. Accordingly, the judgment will be affirmed.

## **DISCUSSION**

A defendant has both a constitutional and a statutory right to be present at critical stages of a criminal prosecution. (*People v. Romero* (2008) 44 Cal.4th 386, 418.) One such critical stage is sentencing. However, this right to be present is not absolute. (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202.) A competent defendant may waive such right, including the right to be present at sentencing. (§ 1193; *People v. Robertson* (1989) 48 Cal.3d 18, 62.)

Here, appellant waived her right to be present at sentencing in cases 9998 and 9710 when she requested, through her attorney, that sentence be imposed in her absence on September 7, 2007. This request was in compliance with section 1203.2a, which provides, in pertinent part: “If any defendant who has been released on probation is committed to a prison in this state or another state for another offense, the court which released him or her on probation shall have jurisdiction to impose sentence ... for the offense for which he or she was granted probation, in the absence of the defendant, on the request of the defendant made through his or her counsel ....”

Relying on this court’s opinions in the prior appeals, i.e., F054010 and F054011, appellant argues that her waiver was defective and therefore inoperative. However, that is not what this court held. Rather, we held that when appellant sent the trial court her “motions” in April and May 2007, and her handwritten letters in July 2007, she did not trigger the 30-day time period during which the trial court must impose sentence or lose jurisdiction to do so contained in the third paragraph of section 1203.2a. Nevertheless, the September 7, 2007, request made through counsel was a valid request to be sentenced and waiver of her right to be present.

## **DISPOSITION**

The judgment is affirmed.